Supreme Court, U.S.
FILED

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NO. 03 - 49 JUL 3 2003

In The

Supreme Court of the United States

ROY EUGENE ROSS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals, Ninth District Of Texas
At Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the decision of the Court of Appeals deny Petitioner due process of law by failing to adequately review the appellate complaint concerning claims on direct appeal that the trial court's jury instruction allowed the jury to convict Petitioner of offenses not alleged in the indictment?

(2) Does the decision of the Court of Appeals deny Petitioner due process of law by failing to adequately review the appellate complaint concerning claims on direct appeal that the trial court's jury instruction allowed the jury to convict Petitioner of multiple offenses arising out of the exact same conduct?

(3) Does the decision of the Court of Appeals deny Petitioner due process of law by failing to adequately review the appellate complaint concerning claims on direct appeal that the trial court's jury instruction mislead the jury and denied him due process concerning his parole eligibility?

(4) Does the decision of the Court of Appeals deny Petitioner due process of law by failing to adequately review the appellate complaint concerning claims on direct appeal that the trial court erred in denying Petitioner's motion for new trial based upon *Brady* violations made by the State of Texas?

(5) Does the decision of the Court of Appeals deny Petitioner due process of law by failing to adequately review the appellate complaint concerning claims on direct appeal that the trial court erred in denying Petitioner's motion for new trial based upon his claims of ineffective assistance of counsel?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Roy Eugene Ross, respectfully prays that a writ of certiorari issue to review the refusal of the petition for discretionary review by the Texas Court of Criminal Appeals and judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, holding that the trial court's jury charge did not allow the jury to convict Petitioner of offenses not alleged in the indictment, that it did not allow the jury to convict Petitioner of multiple offenses arising out of the exact same conduct, that the jury charge did not mislead the jury and thereby did not deny Petitioner due process concerning his parole eligibility, that the trial court did not deny him due process by denying his motion for new trial based upon *Brady* violations committed by the State of Texas, that Petitioner was not denied effective assistance of counsel, and did not fail to apply Texas and federal law, and constitutional protection.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Ninth District of Texas at Beaumont, Texas, is unpublished as *Ross v. State*, 2002 Tex. App. LEXIS 8974, (Tex. App.-Beaumont 2000), and appears in Appendix A to this petition as *Roy Eugene Ross v. The State of Texas*, #09-01-517-CR, December 19, 2002.

This petition is timely filed in that it is filed seeking review of a lower state court judgment subject to discretionary review by the state court of last resort, the Texas Court of Criminal Appeals, Austin, Texas, within 90 days after the entry of the order denying discretionary review.

The Texas Court of Criminal Appeals refused discretionary review on April 9, 2003. A copy of the order refusing discretionary review by the Texas Court of Criminal Appeals appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals, Ninth District of Texas at Beaumont's opinion in this matter was filed on December 19, 2002. The Texas Court of Criminal Appeals refused discretionary review on April 9, 2003. This Court's jurisdiction is invoked under Title 28 U.S.C. §1257, and pursuant to the U.S. Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the U.S. Constitution are involved to the extent that the decision of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, denied Petitioner due process of law.

The statute upon which Petitioner was convicted is Texas Penal Code, §§21.11, 22.011.

STATEMENT OF THE CASE

This petition involves convictions arising from a prosecution in the 411th District Court of Polk County, Texas, at Livingston, Texas, of the felony offenses of sexual assault of a child, two counts, and indecency with a child, two counts. Petitioner raised the federal questions involved

before the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in the original Brief for Appellant timely filed with the Court of Appeals on March 4, 2002, by pointing out by specific references in the trial record and the various opinions requiring a reversal and an acquittal based upon issues involving constitutional dimensions. Petitioner's original brief complained of, *inter alia*, egregious errors in the jury charge, *Brady* violations committed by the State of Texas, and denial of effective assistance of counsel, and set out the original complaints warranting a reversal of the convictions. Likewise, Petitioner again raised the constitutional issues before the Texas Court of Criminal Appeals, but review was summarily refused as indicated by the attached Appendix B.

Petitioner, Roy Eugene Ross, contends that the trial court's jury charge allowed the jury to convict Petitioner of offenses not alleged in the indictment, allowed the jury to convict Petitioner of multiple offenses arising out of the exact same conduct, that the jury charge mislead the jury and thereby denied Petitioner due process concerning his parole eligibility, that the trial court denied him due process by denying his motion for new trial based upon *Brady* violations committed by the State of Texas, that Petitioner was denied effective assistance of counsel, and that the trial court failed to apply Texas and federal law, and constitutional protections. While a complete review of the evidence is necessary in order to evaluate these issues should this Court grant a writ of certiorari, Petitioner details the pertinent evidence in the Reasons for Granting the Writ hereinbelow.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the Court of Appeals, Ninth District of Texas at Beaumont, Texas, and the Texas Court of Criminal Appeals by its refusal of review, have decided important questions of federal law in a way that conflicts with relevant decisions of this Court. The Court of Appeals issued an opinion that renders the decisions of this Court concerning constitutional safeguards to be of no consequence. Additionally, by failing to even properly review the trial court's jury charge error and apply Texas law, the Court denied Petitioner due process.

The appellate courts have allowed Petitioner's convictions and sentences to stand where Petitioner was wrongfully convicted. In doing so, the Court of Appeals has decided an important question of state law in a way which conflicts with the applicable decisions of this Honorable Court. Furthermore, in affirming Petitioner's convictions and sentences, the Court of Appeals has departed so far from the accepted and usual course of judicial proceedings that this Honorable Court must exercise its power of supervision.

In a total of five points of error, Petitioner complained to the Court of Appeals of the trial court's erroneous jury charge. This Honorable Court has noted that jury charges are reviewed with a careful eye and firm recognition of how a "reasonable juror" could have interpreted the instructions, and not a gathering of Law Review luminaries. *Sandstrom v. Montana*, 422 U.S. 510, 99 S. Ct. 2450, 61 L.Ed. 2d 39 (1979). Petitioner complained that the jury instruction allowed the jury to convict him of the offenses of indecency with a child when the complaining witness

was over the age of sixteen. Petitioner was indicted for the offenses of sexual assault of a child, two counts, and for two counts of indecency with a child. In its jury charge, the trial court instructed the jury that the term "on or about the 1st day of May, 1991" meant any day before October 6, 2000, and after October 7, 1990. Further the trial court charged the jury that the term "on or about the 1st day of August, 1991" meant any day before October 6, 2000, and after October 7, 1990. Petitioner further complained that these definitions resulted in a fatal variance between the proof required by the indictment and by the jury charge, that there was no specificity as to the date the alleged offenses occurred, and that such a definition expanded the possible date of the alleged offenses in violation of Petitioner's federal and state constitutional rights. The Court of Appeals perfunctorily stated that the argument made on appeal did not comport with the objection made at trial, and, therefore, nothing was presented for review. In doing so, the Court of Appeals has completely disregarded long-standing precedent of the Texas Court of Criminal Appeals to review error in the interest of justice. *Fella v. State*, 573 S.W. 2d 548 (Tex. Crim. App. 1978).

Fundamental error exists when the error goes to the basis of the case so that the charge fails to state and apply the law under which Petitioner is prosecuted. *Harris v. State*, 522 S.W. 2d 199 (Tex. Crim. App. 1975). Fundamental error exists when the charge allows, *inter alia*, the jury to convict Petitioner for conduct which is not an offense as well as to convict for conduct which is an offense. *Cumbie v. State*, 578 S.W. 2d 732 (Tex. Crim. App. 1979). The Court of Appeals stated in two sentences that the jury charge required the jury to find the victim was under the age of

seventeen when Petitioner allegedly committed the offenses charged, and, therefore, the charge was not erroneous. In other words, the jury convicted him, therefore they must have done it correctly. Furthermore, the Court of Appeals held that there was no fatal variance between the proof required by the indictment and that required by the jury charge because the charge required the jury to find that the complainant was under the age of seventeen. This reasoning by the Court of Appeals completely ignores the facts *sub judice*.

The jury was allowed to consider any date between the dates of October 7, 1990, and October 6, 2000. The Court of Appeals held *sub silento* that the jury would only consider the dates between October 7, 1990, and August 29, 1998, the complaining witness' seventeenth birthday. It simply defies logic to suggest that because the complainant turned seventeen on August 30, 1998, the jury simply ignored the dates from August 30, 1998, until October 6, 2000, despite being told to expressly consider that date range. This logic is circuitous. This "ends justifies the means" logic has no place in our jurisprudence. It stands for the proposition that because the complaining witness must be under seventeen in order for Petitioner to be convicted of the charged offenses, and because Petitioner was convicted of the charged offenses, then the jury must necessarily have only considered the dates between October 7, 1990, and August 30, 1998. This omits one crucial fact: the jury was allowed to consider dates outside this range. It is true that "on or about" language permits the state to prove a date other than the one alleged, so long as the date proven is anterior to the presentment of the indictment, and *within the statute of limitations. Scoggan v. State*, 799 S.W. 2d 679 (Tex. Crim. App. 1990)

(emphasis added). The purpose of the date allegation is to put the accused on notice to prepare for proof within the statutory period of limitations. However, as applied herein, such a charge allowed the jury to convict Petitioner of a date which was anterior to the presentment of the indictment, and within the statute of limitations, but on a date when the complaining witness was over the age of sixteen. There is absolutely nothing to suggest the jury limited themselves to the correct date range despite the erroneous charge save the conviction.

The Texas Court of Criminal Appeals has addressed this issue previously, yet declined to follow its own precedent herein. In overturning *Antunez v. State*, 647 S.W. 2d 649 (Tex. Crim. App. 1983), the Court of Criminal Appeals found that the charge therein contained abstract principles concerning the law of robbery, the offense with which the Petitioner was charged, but failed to apply those principles to the facts of the case. The result was that the jury was left to speculate about which specific actions on the Petitioner's part would, if believed beyond a reasonable doubt, constitute evidence of robbery. The exact same error occurred here. Given the fact that the jury charge allowed the jury to convict Petitioner for conduct which would not constitute an offense, the jury was left to speculate which alleged conduct of Petitioner's would constitute evidence of the offenses charged. It is undisputed that the state produced testimony that Petitioner engaged in conduct with one of the complaining witnesses when the complaining witness was eighteen years of age.[1] The jury

[1] Petitioner does not concede that he in fact engaged in this conduct, only that the State produced testimony that he did.

charge allowed the jury to convict Petitioner based upon this conduct when in fact this conduct does not and could not constitute an offense under the indictment presented by the grand jury. The Court of Appeals approved this error in its opinion, which is totally repugnant to our criminal justice system.

In fact, this is exactly the type of jurisprudential gerrymandering abhorrent to our concepts of fairness and impartiality. It demonstrates the evil inherent in such jury charges which enlarge the charged offense, allowing the accused to be convicted of an offense which was a legal impossibility, as Petitioner was here. It is legally and factually impossible for Petitioner to be convicted for the charged offenses when the complaining witness is over sixteen. However, this is exactly what the trial court's charge allowed. Furthermore, Petitioner complained that the jury charge allowed the jury to convict him of two different offenses arising out of the same conduct. This is certainly a double jeopardy violation. Allowing the court to charge that "on or about" means anywhere within a ten year period without more specificity, then to allow Petitioner to be convicted of two offenses allegedly occurring somewhere within this time frame is constitutionally repugnant. There is absolutely nothing to stop the jury from convicting Petitioner of two offenses for the same conduct. For the Court of Appeals to place their imprimatur on such an act is outrageous.

Petitioner additionally complained that the trial court erred in instructing the jury that he must serve fifty percent of his sentence before being eligible for parole and that he could receive good conduct time pursuant to art. 37.07, §4, Texas Code of Criminal Procedure. Petitioner complained that while the aforementioned statute does

grant parole eligibility as stated, that is not, in fact, how parole is governed by other statutes. The Court of Appeals, however, failed to address the merits of his claims. Petitioner demonstrated that 42 U.S.C.A. §13701 provides that there must be a minimum national standard to comport with the federal statute in order to receive federal funding. The Court of Appeals simply stated that if Petitioner served less than eighty-five percent of his statute, the State of Texas would not receive funds under the federal statute. That, according to the Court of Appeals, does not alter the sentencing scheme under Texas law.

In reviewing a due process claim, the Court of Appeals must first decide whether a protected liberty or property interest exists, and, if so, decide whether sufficient procedural safeguards are employed to assure the deprivation of that interest is not arbitrary. *Morrissey v. Brewer*, 408 U.S. 741, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). A liberty interest may arise from either the due process clause itself, or from state statutes. *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). Furthermore, a statute will create an expectation or entitlement if it places substantive limitations on official discretion to deny the particular interest. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). The Court of Appeals herein, however, addressed none of this.

The Court of Appeals perfunctorily stated that the federal statute only denies funds to the State of Texas, it does not affect the sentencing scheme enacted by the Texas legislature. Such a statement is blatantly wrong, and in effect denies to Petitioner the same due process safeguards about which he complains.

The Court of Appeals is required to engage in a two prong test in evaluating a due process claim. *Morrissey, supra*. This it failed to do. Exacerbating the harm to Petitioner is the fact that he had a meritorious claim which would have prevailed had the Court of Appeals engaged in the compulsory review.

Due process demands that the government not "imprison or otherwise physically restrain" a person except in accordance with fair procedures. *Long v. State*, 742 S.W. 2d 302 (Tex. Crim. App. 1987). Replete in the discussions of "due process" is the ideology of "fairness." Such a nebulous concept lends itself to much interpretation. However, at its core is the concept of balanced dealings of a government, state or federal, and its citizens, between the entity which receives its power from those who have the authority to grant it. It is wholly unconscionable, therefore, for a citizenry to allow the government to control parole, and then to have those same citizens treated unfairly by that same government. In the case *sub judice*, the jury was charged that Petitioner would be eligible for parole after serving half of his sentence. They were not, however, told of another federal statute which denies money to the state government if those persons such as and including Petitioner serve less that eighty-five percent of a sentence. Therefore, while 42 U.S.C.A. §13701 does not expressly impinge Texas sentencing schemes, it does greatly and directly impact them. However, this is not what the jury is charged. What the jury is told amounts to nothing more than a "bait and switch" scheme. The jury is told of one parole scheme, and then the defendant is impacted by another after sentencing. Where is the equity in such a scheme? Instead of reviewing the jury charge herein with the aforementioned "firm eye," the Court of Appeals acted

more like the blind hog in search of the proverbial acorn, with the blind hog being more successful.

The Court of Appeals further sustained this scheme by refusing to address it as required. Such a result cannot be allowed to stand. It is the obligation of this Honorable Court to correct such an aberration.

Additionally, the Court of Appeals erred in holding that the trial court did not err in refusing to grant Petitioner a new trial based upon *Brady* violations. The State has an affirmative duty to provide to Petitioner exculpatory material either actively or constructively in its possession. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In reviewing a *Brady* violation, the Court of Appeals must review three prongs: whether the State failed to disclose evidence, regardless of the prosecutor's good or bad faith; whether the evidence withheld is favorable to the accused; and whether the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. The Court of Appeals did not apply all three prongs herein, and of those it did, it misapplied them.

It is obvious from the opinion the Court of Appeals agreed the State failed to disclose the existence of a material witness who was a convicted sex offender, was related to the complaining witness, and had frequent contact with the complaining witness. The Court of Appeals simply states that Petitioner failed to identify how the existence of this witness would be favorable to him. Since Petitioner did not show, in the court's opinion, how this witness was favorable, the evidence complained of is

immaterial. Such a libertine review, however, does not comport with *Brady, supra.*

The Court of Appeals states that Petitioner did not show how the existence of the sex offender would be material evidence. In doing so, the Court of Appeals ignored five pages of argument by Petitioner in his brief before the Court, as well as testimony during the motion for new trial hearing. Petitioner only learned of this exculpatory evidence shortly before the aforesaid hearing. In his brief, Petitioner showed that evidence was in the state's possession that another person, hereinafter referred to as A.A., who was a convicted sex offender is the nephew of the complaining witness's mother. One of A.A.'s victims dated the other complaining witness herein, J.D. The complaining witness C.R. herein knew and was friends with one of A.A.'s victims. A.A. was a registered sex offender, registered with the Polk County Sheriff's Department, the same county wherein the conduct made the basis of the prosecutions herein took place. It is impossible to say that all of this evidence is not exculpatory. It certainly shows there is another individual who likely committed the offenses herein. It is quite clear that had this evidence been available to Petitioner prior to trial, there is a reasonable probability that the outcome of the trial would have been different. The Court of Appeals, however, chose to ignore this in clear defiance of its obligations under *Brady*.

Petitioner further complained on direct appeal of ineffective assistance of counsel. He provided a litany of deficiencies and errors committed by his trial counsel. The Court of Appeals merely responded that his counsel's performance as a whole was not deficient, and that the record did not show that but for any deficient performance

there is a reasonable probability the result of the trial would have been different. Such a conclusion defies logic.

Petitioner's trial counsel allowed to be introduced into evidence a videotape for the jury's consideration showing an alleged encounter between Petitioner and one of the complaining witnesses after the witness was eighteen years of age. He did not object to the introduction of the hearsay statement of the other complaining witness. He did not file the requisite pre-trial motions, and admitted that there were alleged extraneous offenses with which he was unfamiliar. The greatest tragedy of Petitioner's failure to file a *Brady* motion is the undisclosed availability of a convicted sex offender, and the probability that this sex offender actually committed the offenses herein.

Trial counsel further failed to call witnesses favorable to Petitioner, despite their being present and available to testify. Petitioner's trial counsel made no effort to assess Petitioner's competency to stand trial following a head injury he sustained approximately fourteen months prior to trial. Petitioner stated during his testimony that his injury was the result of a car wreck. It was not the result of a car wreck, but the result of Petitioner's being the victim of an aggravated assault by being struck in the head repeatedly with a hammer. His trial counsel, however, made no effort to obtain an expert to assist in determining Petitioner's ability to assist in his own defense. Additionally, despite having had a motion in limine granted, Petitioner's trial counsel repeatedly failed to object to testimony made the basis of the limine motion.

In order to prevail on a claim of ineffective assistance of counsel, Petitioner must show that his counsel's performance fell below an objective standard of reasonableness

based upon prevailing professional norms, and that, but for this deficient performance, there exists a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Trial counsel failed to interview potential defense witnesses, thereby rendering his performance ineffective. *Ex parte Ybarra*, 629 S.W. 2d 943 (Tex. Crim. App. 1982). There was no investigation done to determine whether to call defense witnesses or not. *Ex parte Welborn*, 785 S.W. 2d 391 (Tex. Crim. App. 1990). There was no discovery performed. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). There was no effort made to advance the defensive theory that these prosecutions were nothing more than vendettas against Petitioner by his ex-spouse. In short, there was no defense put forth at all. Counsel, therefore, was not acting as counsel as contemplated by the Sixth Amendment to the United States Constitution.

Reviewing all of these claims singularly in a vacuum may lead to the conclusion that Petitioner received effective assistance of counsel. However, reviewing the record as a whole, it is abundantly obvious that the cumulative effect of Petitioner's trial counsel's performance was wholly ineffective. Petitioner was convicted of each and every charge alleged, and was sentenced to the maximum term of imprisonment for each. It is not possible to see how he could have been harmed more. The Court of Appeals, therefore, misapplied the holdings of the Texas Court of Criminal Appeals declaring that Petitioner received effective assistance of counsel.

The decision of the Court of Appeals therefore conflicts with the above-cited authorities, and has decided important questions of federal law contrary to existing authority. The

issues should be addressed and resolved by this Court. Petitioner is at the very least entitled to a meaningful review which must result in a new trial. The Court of Appeals failed to address the issues on this basis adequately, thereby denying Petitioner the review to which he is entitled by due process.

For these reasons, Petitioner urges that this Court grant a writ of certiorari to review the opinion of the Court of Appeals, Ninth District of Texas, and refusal of Petition for Discretionary Review by the Texas Court of Criminal Appeals, and that a judgment of acquittal be entered, or in the alternative that a new trial be granted.

This Court should grant certiorari to determine these issues and to resolve the conflict between the opinion of the Court of Appeals, Ninth District of Texas, the Texas Court of Criminal Appeals, and this Court in the various cases relating to said issue.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in this case.

DATED: July 3, 2003.

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

No. 09-01-517 CR

ROY EUGENE ROSS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 15,937

MEMORANDUM OPINION

(Filed Dec. 19, 2002)

A jury convicted Roy Eugene Ross of two counts of sexual assault of a child and two counts of indecency with a child. For each count, the jury sentenced Ross to twenty years' confinement in the Institutional Division of the Texas Department of Criminal Justice and assessed a fine of $10,000. The sentences run concurrently. Ross appeals raising twelve points of error. Because all issues of law are settled, our opinion only advises the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. 47.1.

In point of error one, Ross contends the trial court erred by instructing the jury on Counts III and IV that the term "on or about" meant any day before October 6, 2000

and after October 7, 1990, because that instruction allowed the jury [sic] consider events occurring after the seventeenth birthday of one of the alleged victim's, J.R., in August 1998. Ross' point of error on appeal does not comport with the objection made at trial. Accordingly, nothing is presented for review. *See* TEX. R. APP. P. 33.1(a). The jury charge required the jury to find that J.R. was under the age of seventeen on the date Ross engaged in sexual contact with J.R. Therefore, the charge was not fundamentally erroneous, as argued by Ross. Point of error one is overruled.

Point of error two claims the trial court erred in that the jury instructions allowed conviction for events occurring on or after J.R .'s seventeenth birthday, constituting a fatal variance between the proof required by the indictment and the jury charge. The indictment alleged in Counts III and IV that when the offenses were committed J.R. was a child younger than 17 years. The charge to the jury on Counts III and IV, in both the abstract and application paragraphs, comported with the indictment and required the jury to find J.R. was a child younger than seventeen in order to convict Ross of indecency with a child. Accordingly, there is no variance between the proof required and the charge to the jury did not allow for conviction for events occurring after J.R.'s seventeenth birthday. Point of error two is overruled.

Point of error three argues the trial court erred in instructing the jury to convict for any date within a ten-year period when neither Count I nor Count IV of the indictment were proven to have occurred on an ascertainable date. In both cases, Ross complains the State failed to prove the offenses occurred prior to the seventeenth birthday of either C.R. or J.R. Regarding Count I, the

record establishes C.R. was 14 or 15 years at the time of the offense. As to Count IV, there was evidence presented that the offense occurred before J.R.'s seventeenth birthday. Thus the State did establish the offenses occurred prior to C.R.'s and J.R.'s seventeenth birthdays. Point of error three is overruled.

In point of error four, Ross alleges the trial court erred in instructing the jury by its definition of "on or about." Ross argues the definition "changed" the dates alleged in the indictment. The indictment alleged "on or about" in all four counts. It is well settled that the "on or about" language allows the State to prove a date other than the one alleged as long as the date proven is anterior to the presentment of the indictment and within the statutory limitation period. *See Wright v. State,* 28 S.W.3d 526, 532 (Tex. Crim. App. 2000), *cert. denied,* 531 U.S. 1128, 121 S.Ct. 885, 148 L.Ed.2d 793 (2001). The trial court's definition comports with *Wright.* Point of error four is overruled.

Point of error five contends the trial court erred in allowing the State to call C.R. as a witness, solely for the purpose of impeaching her testimony with a prior inconsistent statement. Trial counsel objected "to this testimony for any purpose other than impeachment and would request a limiting instruction to that." Subsequently, a limiting instruction was given to the jury. We generally presume that a jury follows the instructions given by the trial judge. *See Lafleur v. State,* 84 S.W.3d 309, 312 (Tex. App. – Beaumont 2002, pet. filed). Given the testimony of J.R., there is no showing that the jury ignored the instruction as Ross claims. Point of error five is overruled.

Point of error six alleges the evidence is factually insufficient to support Ross' conviction under Count I.

Ross claims the testimony of C.R. and J.R. is too unreliable to constitute sufficient evidence to support his conviction under this count. C.R.'s denial at trial of the assault by Ross was impeached by her prior statement. The jury, as trier of fact, is the exclusive judge of the credibility of the witnesses, the weight to be given their testimony, and may accept or reject all or any part of the testimony of any witness. *See Joseph v. State,* 897 S.W.2d 374, 376 (Tex. Crim. App. 1995). Our review of the evidence for factual sufficiency must be "appropriately deferential" to the factfinder's determination to avoid substituting our judgment over that of the trier of fact. *See Clewis v. State,* 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). Viewing all of the evidence without the prism of "in the light most favorable to the prosecution," we find the jury's verdict under Count I is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis,* 922 S.W.2d at 135. Point of error six is overruled.

In point of error seven Ross argues the trial court erred in instructing the jury about parole eligibility. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4 (Vernon Supp. 2003). Ross claims the instruction violates his right to due process because under a federal grant-in-aid statute he is actually required to serve eighty-five percent of his sentence to be eligible for parole, rather than fifty percent, as the jury was instructed. If the law of the State of Texas fails to comport with the federal statute, the result would be to render the State ineligible for funds, not to alter the sentencing scheme enacted by the Texas legislature. Accordingly, the crux of Ross' claim is without merit and point of error seven is overruled.

In point of error eight Ross argues the trial court erred in instructing the jury per TEX. CODE CRIM. PROC. ANN. art. 37.07, section 4, about good conduct time. Ross' arguments have been rejected by this court and the Court of Criminal Appeals. *See Luquis v. State,* 997 S.W.2d 442, 443-44 (Tex. App. – Beaumont 1999), *aff'd,* 72 S.W.3d 355 (Tex. Crim. App.2002). Point of error eight is overruled.

Point of error nine contends the trial court erred in failing to grant Ross' motion for new trial upon discovery the State had failed to disclose the identity of a material witness, Alvie Lee Austin. We characterize Ross' argument as charging a *Brady* violation occurred. *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, Ross fails to identify how knowledge of the "existence" of Austin and his victim constituted or would have led to favorable evidence in his case. Our confidence in the outcome of the proceeding against Ross is not undermined by the mere existence of other sex offenders in proximity to the victims. Accordingly, we are unable to say the trial court's denial of Ross' motion for new trial based on the failure to disclose *Brady* material constituted an abuse of discretion. *See Salazar v. State,* 38 S.W.3d 141, 147 (Tex. Crim. App. 2001), *cert. denied,* ___ U.S. ___, 122 S.Ct. 127, 151 L.Ed.2d 82 (2001). Point of error nine is overruled.

Ross' tenth point of error claims the trial court erred in submitting jury instructions on both Counts III and IV because they were capable of being the same offense, a double jeopardy violation. Ross' argument is based on the alleged dates of the two offenses and the use of "on or about." It is well settled that "on or about" allows the State to prove a date other than the one alleged as long as the

date proven is anterior to the presentment of the indictment and within the statutory limitation period. *See Wright,* 28 S.W.3d at 532. The evidence in this case established that Ross had numerous sexual contacts with J.R. from May of 1991 through 1994. Therefore, the evidence in this case is not tied to the specific dates alleged in the indictment, but to that time period. The evidence shows Ross committed the alleged criminal acts on at least two separate occasions during this time, thus the trial court's submission of two counts was proper. *See generally DeMoss v. State,* 12 S.W.3d 553, 560 (Tex. App. – San Antonio 1999, pet. ref'd). Point of error ten is overruled.

Point of error eleven claims trial counsel rendered ineffective assistance. To prevail, an appellant must demonstrate trial counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms, and that, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *See Strickland v. Washington,* 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State,* 988 S.W.2d 770 (Tex. Crim. App. 1999). Allegations of ineffective assistance must be firmly founded in the record. *See Thompson v. State,* 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). The presumption of reasonable effectiveness cannot ordinarily be overcome absent evidence in the record of the attorney's reasons for his conduct. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Ross contends counsel erred "in allowing the jury to consider acts up to October 6, 2000, [the date the indictment was entered] which included the videotape . . . *via* their instructions under Counts III and IV . . . since [J.R.] turned [seventeen] in August, 1998." It has not been

established on appeal that the videotape was inadmissible so as to render trial counsel's failure to object to it deficient. No other "acts" are identified and we are not referred to any in the record. The jury was clearly instructed that it must find J.R. was a child younger than seventeen when the acts occurred in order to convict Ross.

Ross complains regarding admission of C.R.'s prior inconsistent statement that trial counsel "only objected to its use 'for any purpose other than impeachment.'" There has been no showing on appeal that C.R.'s statement was not admissible for purposes of impeachment and the jury was instructed not to use it for any other purpose.

Ross claims trial counsel was deficient in failing to have C.R. physically examined. Trial counsel gave his reasons for not requesting an examination. Ross' brief asserts trial counsel's basis was incorrect but provides no record references in support. Ross contends trial counsel was not adequately prepared to question C.R. but fails to identify any benefit from more preparation.

Ross complains trial counsel failed to file any *Brady* or discovery motions. At the hearing on Ross' motion for new trial, counsel testified that the District Attorney's office in Polk County had an open file policy and he had never had a problem on a "*Brady* matter." As noted in our discussion of point of error nine, the "existence" of Alvie Austin was never shown to be exculpatory evidence. Thus a *Brady* violation has not been raised.

Ross contends trial counsel failed to adequately investigate potential witnesses, resulting in no viable defense. Ross implies a defense that Alvie Austin was the perpetrator. There is no evidence supporting such an inference. None of the victims implicated Austin. The fact

that Austin was a member of the household and is now a convicted sex offender does not indicate that he, rather than Ross, assaulted the three victims. Rather, it might have led the jury to conclude Austin was also a victim.

Ross alleges trial counsel failed to call favorable witnesses, specifically Rachel Ross or Roy Ross, Jr. The record fails to demonstrate the testimony of either would have been favorable and trial counsel testified he did not call Roy Jr. because "I think he would have made a horrible impression on the jury."

Ross contends trial counsel failed to consult or seek an expert either to assess Ross' competency to stand trial following a head injury or to consider the possibility of SAID[1] syndrome. The evidence adduced at the hearing on Ross' motion for new trial does not demonstrate the viability of either course or that either would have resulted in a different outcome.

Ross argues trial counsel erred in failing to object to testimony that he assaulted two other children, over whom no charges were brought, and failed to request a limiting instruction for these extraneous offenses. Ross does not identify for what purpose the testimony was admissible, so that a limiting instruction was appropriate. At the hearing on the motion for new trial, counsel was not questioned regarding his failure to object. Thus, the record is silent as to trial counsel's reasons and we are unable to conclude that trial counsel's performance was deficient. *See Osorio*

[1] Sexual Allegations in Divorce.

v. State, 994 S.W.2d 249, 253 (Tex. App. – Houston [14th Dist.] 1999, pet. ref'd).

Ross complains of trial counsel's failure to request a *Huizar* instruction in the jury charge on punishment. *See Huizar v. State,* 12 S.W.3d 479 (Tex. Crim. App. 2000). Ross does not argue, much less demonstrate, that the jury would have assessed a different sentence had the instruction been given. No extraneous offenses were introduced during the punishment phase, the extraneous offenses Ross complains of were admitted during guilt/innocence and the instruction was given in that charge. While that does not eradicate the error, it does impact the effect. We cannot conclude that "but for" counsel's failure, the jury would not have assessed the sentence it did.

Trial counsel testified he did not object to the admission of the tape because it was admissible. No further query was made into trial counsel's reasoning. Because the record is silent, we cannot say trial counsel performed deficiently.

Ross complains of trial counsel's failure to request an outcry hearing but fails to refer this court to the record wherein it is established that any of the children made an outcry or that any such statements were admitted into evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 2003). He also fails to demonstrate how an outcry hearing would have affected the proceedings.

Considering trial counsel's performance as a whole, we cannot conclude it was deficient or that but for any error there is a reasonable probability the result of the proceeding would have been different. Point of error eleven is overruled.

In his final point, Ross argues the trial court erred in failing to include an instruction to the jury at the punishment stage on the "reasonable doubt" burden of proof for extraneous offenses. At the close of the guilt/innocence phase, the jury was instructed the burden of proof for extraneous offenses was "beyond a reasonable doubt." The charge to the jury at punishment did not include such an instruction. The trial court erred in failing to give, sua sponte, a reasonable-doubt instruction regarding the extraneous offenses. *See Huizar,* 12 S.W.3d at 484. *See also Allen v. State,* 47 S.W.3d 47, 50 (Tex. App. – Fort Worth 2001, pet. ref'd). Reversal is required if egregious harm resulted. *See Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). The harm which must be considered is the impact of the omission in the jury charge of a reasonable-doubt instruction. *See Ellison v. State,* 86 S.W.3d 226, 228 (Tex. Crim. App. 2002). We assess the degree of harm in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and all other relevant information revealed by the record as a whole. *Id.* In that light, we cannot conclude the trial court's omission is so egregious and created such harm that Ross did not receive a fair and impartial trial. The jury's assessment of punishment, while the maximum, is within the permitted range and justified by the evidence presented. Point of error twelve is overruled.

The judgment of the trial court is AFFIRMED.

PER CURIAM

Submitted on November 15, 2002
Opinion Delivered December 19, 2002
Do not publish

Before Walker, C.J., Burgess, and Gaultney, JJ.

APPENDIX B

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

[Postmark – April 10, 2003]

April 9, 2003
COA#: 09-01-00517-CR
RE: Case No. 0162-03
STYLE: ROSS, ROY EUGENE

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

DOUGLAS M BARLOW
485 MILAM
BEAUMONT TX 77701